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May 7, 2003

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St, SW
Washington, DC 20554

Re: Written Ex Parte Notice—MB Docket No. 02-277, MM Docket No. 01-235, 01-317,
00-244

Dear Ms. Dortch:

On May 7, 2003, on behalf of the Center for Digital Democracy, we hereby submit an ex parte filing that was faxed today to Chairman Michael K. Powell; Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin, and Jonathan S. Adelstein.

If there are questions, please contact us.

Sincerely,

Jeffrey A. Chester
Executive Director

May 7, 2003

Chairman Michael K. Powell
Federal Communications Commission
44512th Street, S.W.
Washington, DC 20554

Dear Mr. Chairman:

As the “Omnibus Ownership Proceeding” nears its June 2 conclusion, the Center for Digital Democracy wants to state on the record that the Commission has, in our opinion, failed to develop an adequate process for the meaningful assessment and analysis of the contemporary U.S. media marketplace. From your statements, including your recent speech before the National Newspaper Association (NAA), we believe you and your staff have ultimately developed an ideologically driven record that does not reflect realities of today’s communications landscape. The process you have developed for the current biennial review, as we shall discuss below, is insufficient grounds for the development of any new public policies on ownership. Indeed, the process would not stand traditional scholarly scrutiny if it were an exercise performed under academic peer review. But, Mr. Chairman, this is not an exam or a journal article that you are writing. The impending June decision will have far-reaching consequences for our democracy, affecting civic discourse, journalism, and popular culture. When, upon hearing your speech, the outgoing chairman of the NAA (who supports rule changes on newspaper cross-ownership) says to the press that “I could have written the speech myself” it reflects one of the most disturbing patterns in this whole proceeding—your inability to craft a well-documented record that also involves the public in a serious manner. Consequently, given your bias that has been apparent throughout the proceeding, we urge you to recuse yourself from voting in this proceeding.¹

When the Commission first launched this proceeding in September 2001, we expressed concern that the agency was not interested in obtaining an honest record. Indeed, we believe that under your leadership the FCC has engaged in an intellectually dishonest inquiry. For example, your recent Seattle speech reflecting on “digital migration” mentions cable TV and the Internet, something you and the proceeding frequently refer to. But you fail to acknowledge that the Commission’s own actions may (and I believe will) negatively impact the capability of so-called new networks to offer meaningful competition and choice. For example, there has been no serious discussion of the Commission’s current proceeding on cable TV ownership, and how it will affect competition, content diversity, and local service. Nor have your new policies defining

¹ “Powell to NAA: Expect Ownership Reform: ‘FCC Chair Says Publishers Will ‘Fare Well,’” *Editor and Publisher*. 28 Apr. 2003.

cable broadband as an information service—which will allow those networks to operate a closed Internet architecture—been discussed by you in this proceeding.²

I wish to make clear that your Democratic predecessors also deserve blame. The Commission has for too long rotated in the media lobby's orbit. Consequently, it has developed a "don't ask, don't tell" posture concerning the realities of the media marketplace. I fear, as a result, that what you will do next month will not serve anyone well, except the nation's largest media companies that seek to assemble what they call "additional platforms." Your agency ignores what is a rising expression from *within* the media industry about what everyone other than the unclothed emperor at the FCC knows: there is a tight oligarchy in control over broadcast and cable television today. It is extending into the broadband world. The evidence of this consolidation has been presented to the Commission by the Writers Guild of America, west, on several occasions. WGAw represents practically *all* the writers who create and develop US television—hardly outsiders.³ And within the last few weeks two major media industry leaders—Barry Diller and Ted Turner—have spoken out against the consolidation and control that is strangling the TV industry.⁴ As Mr. Turner told one reporter: "Today, the cable companies are large and they have a lot of leverage. The programmers are large and they have a lot of leverage. The days of starting up a cable television network or trying to do it from the outside of the media business are over. It's almost impossible. It's sad for our country."⁵ In a recent Commonwealth Club speech, Turner noted: "There's really five companies that control 90 percent of what we read, see and hear. It's not healthy."⁶ We doubt—because such analysis and criticism are outside your/the Commission's narrow ideological frame—that this viewpoint will be seriously considered by you or the forthcoming set of rules.

You have not created a serious record, or engaged in a meaningful process to do so. Your own commissioned studies were criticized from by many sources, including journalists from major daily newspapers and independent academic experts.⁷ One of your own contracted scholars has even repudiated this proceeding.⁸ You and your media bureau claim that the extraordinary number of commentators in this proceeding is evidence of your commitment to a public process. But almost all of the Comments filed in this proceeding were facilitated by outside groups, including CDD, which urged people to consider the issue and file.⁹ We did this because we believe—unlike the Commission you currently lead—that such significant proposals affecting the future of the U.S. media

² "Hear Ye, Hear Ye Read all About it!" Remarks of Michael K. Powell, Chairman, FCC, at the Associated Press Annual Meeting and General Session of the National Newspaper Association Annual Convention, 28 Apr. 2003.

³ See Writers Guild of America at <http://www.wga.org> under WGA News, "The FCC and Vertical Integration."

⁴ For an interview with Barry Diller, see http://www.pbs.org/now/transcript/transcript_diller.html.

⁵ Quoted in Mermigas on Media, 16 Apr. 2003, <http://onmedia.chaffee.com/>.

⁶ Quoted in Duncan Martell, "Turner Calls Rival Media Mogul Murdoch 'Warmonger,'" Reuters, 25 Apr. 2003, <http://www.reuters.com/newsArticle.jhtml?type=industryNews&storyID=2628350&fromEmail=true>.

⁷ See for example, "Media Put on Show to Change Rules, *Los Angeles Times*, 1 May 2003.

⁸ Mara Einstein, "DeReg? We should Talk Re-Reg," *Broadcasting and Cable*, 28 Apr. 2003.

⁹ "FCC Flooded With Letters Opposing Media Concentration," Dow Jones News Service, 6 Jan. 2003.

system require a commitment to involve the public. The Commission did not engage in any serious outreach efforts—despite the fact that the media ownership issue is directly related to the future health of our democracy. You also refused to hold any public hearing other than a single event in Richmond. That forced your fellow Commissioner Copps to seek other forums, put together without the sufficient resources required to ensure more meaningful public discourse. Indeed, advocates such as CDD had to implore universities across the nation to sponsor such public meetings. The failure of the Commission to engage in a serious public exchange over an issue that your media bureau chief described as having “cosmic” significance last September is another example of the Commission’s failure to perform an adequate job for the public.

CDD doesn’t believe that the Commission, under your leadership, is capable of honestly evaluating the media marketplace. Some of the biggest media companies, including News Corp., GE/NBC, and Viacom/CBS, have filed information with the Commission that is simply misleading and untrue. Indeed, CDD calls on the FCC to open up an investigation into the data presented by these companies on April 21, 2003, before proceeding with a vote on the ownership issue. If these companies are found to have misinformed the Commission, then you should immediately initiate an inquiry to determine whether they have the suitable qualifications to remain public trustees of their operated and owned stations.¹⁰

In their filing, NBC *et al* claims that they receive “better” information from their “O and O’s” versus their affiliates. Yet they conveniently leave out of the “record” the kinds of business relationships that reflect their trust in the judgment of affiliated stations. For example, they fail to mention their joint venture with affiliate Hearst, in the NBC/Hearst-Argyle Syndication, LLC, a joint venture that produces and syndicates “first-run broadcast and original-for-cable programming.”¹¹ The networks have also repeatedly said that their over-the-air TV businesses are threatened from competition, and they have to own more stations to survive. But, once again, other information is in the record. For example, in Hearst-Argyle’s recent 10 K report to the SEC they note:

Cable-originated programming is a significant competitor for viewers of broadcast television programming, although no single cable programming network regularly attains audience levels equivalent to any of the major broadcast networks and, collectively, the broadcast-originated signals still constitute the majority of viewing in most cable homes. The advertising share of cable networks has increased during the 1980s and 1990s as a result of the growth in cable penetration (the percentage of television households that are connected to a cable system), increases in made-for-cable programming and increases in cable channels or networks. Notwithstanding such increases in cable viewership and advertising, over-the-air broadcasting remains the major distribution system locally and nationally for mass market television advertising.¹²

¹⁰ Ex Parte filing by Fox, National Broadcasting Co., Telemundo Communications, and Viacom, 21 Apr. 2003.

¹¹ Hearst-Argyle 10K SEC filing, 31 Mar. 2003.

¹² Hearst-Argyle 10K SEC Filing, 31 Mar. 2003.

Such a statement contrasts with Chairman Powell's frequent claims that over-the-air "free" broadcasting is in jeopardy. The broadcasting business is doing quite well, as the statement above underscores. Broadcast networks also own much of what we see on cable. Still, the Chairman ignores, for example (to cite only a few of their cable holdings) that Viacom/CBS owns MTV, Nick, TNN, Showtime; News Corp/Fox owns Fox News, National Geographic, FX; GE/NBC owns Bravo, MSNBC; Disney/ABC owns ESPN, Toon Disney, Disney Channel. Many of them have cable networks in common, such as the A&E Network co-owned by Disney, GE/NBC, and Hearst. The "hundreds" of cable channels you frequently mention are in fact owned by a small number of companies that also control the major broadcast TV networks.

Indeed, your Commission could inform the courts about the realities of today's TV marketplace, including the consolidation of control over local and national broadcast and cable programming. You could inform them that your decisions on cable and wireline broadband now place competition online at risk (so that companies like Microsoft now openly fear that they will be discriminated against by the media monopolies created by your Commission). And you could inform the courts that maintaining meaningful ownership-diversity rules is essential to ensuring that the public receives a diverse array of news and information instead of a reduction of news sources, avoiding, what the Tribune Company tells investors it is doing with its ability to own more stations—reducing journalistic resources in a community. As Tribune—one of the major backers of ending the broadcast-newspaper cross-ownership safeguard—states in its recent report to shareholders,\

Expanding our national television footprint also means creating more two-station clusters. The acquisition of WTTV last summer made Indianapolis our fourth two-station market, joining Seattle, Hartford and New Orleans. With multiple stations we can achieve higher operating margins in a number of ways, such as cross promoting to improve program ratings and consolidating back-office expenses and news departments.¹³

The broadcast networks simply do not provide accurate information to the Commission for you to base any decision on their Comments and filings. For example, Fox, NBC, Telemundo, and Viacom claim that retransmission consent is only used to secure a local station's market position, and that negotiations don't occur at the network level. They attempt to counter Cox and others who have pointed out to the Commission that the networks use their additional stations as part of a retransmission consent strategy. Indeed, as cited above, broadcasters have significant control over cable programming networks. As for the networks' claim that such retrans negotiations are conducted via a station, not at a network level, the Commission should examine the most recent 10K report by Hearst-Argyle:

¹³ Tribune Company Annual Report, 2002, page 3.

The Company has entered into an agreement with Lifetime, an entity owned 50% by an affiliate of Hearst and 50% by ABC, whereby Lifetime has the right to negotiate the grant of retransmission consent rights on behalf of the Company's owned and managed television stations in return for compensation to be paid to the Company by Lifetime. The agreement between the Company and Lifetime also applies to the grant of DBS retransmission consent rights, for which Lifetime will also compensate the Company.¹⁴

We are also disturbed by the networks' use of such experts as Prof. Bruce Owen. The Commission should be asking how much in compensation Mr. Owen received for his recent *ex parte* submission?¹⁵ How long has he been under contract; and what is its length? What is the relationship between the networks and the financial securities firms that support Mr. Owen's Institute for Economic Policy Research? For example, Goldman Sachs and JP Morgan Chase support the IEPR. The networks and Mr. Owen should disclose what financial interests Goldman *et al* have with the present proceeding.¹⁶ Indeed, the Commission should insist that the funders of all sponsored research make public their financial relationships with academics and other experts.

The Commission should not be relying on the use of experts such as Mr. Owen, but rather seek truly independent media and other scholars. This is something it has not done in this proceeding. As for Mr. Owen's submission entitled "Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules," we are disturbed by his argument that "efficiency" should be the sole evaluating determinant regarding contractual agreements for carriage. Indeed, it is quite telling that the networks' chief economic expert repeatedly relies on fast-food analogies and restaurants like McDonalds to answer concerns over public interest programming responsibilities. Mr. Owen and his colleagues also appear not to be fully informed about the realities of the television business. They discuss the "limitation of the broadcast networks to a single channel" while ignoring that multiple platform realities of today's broadcasting. Indeed, the Owen *et al* paper ignores the realities of the retransmission market. One would simply have to examine the public controversy unleashed by the (then) Time Warner's removal of ABC stations several years ago to understand the leverage networks have in this process.

The result of weaker ownership caps will be an increase in network power—over national broadcast programming and over many cable outlets. The public will not receive diverse programming. Networks will eventually leverage their retransmission power for greater alliances with cable—giving them influence and control over electronic program guides, streaming capacity, PVRs, etc. The real goal of the TV networks' desire to remove and weaken the ownership cap safeguards is to strengthen their position *vis a vis* cable, and to

¹⁴ Hearst-Argyle 10K SEC Filing, 31 Mar. 2003.

¹⁵ "Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules," Bruce M. Owen, Michael G. Baumann and Kent W. Mikkelsen. *Ex parte* document filed by Fox, NBC, Telemundo, Viacom, 21 Apr. 2003

¹⁶ For a donor list, see http://siepr.stanford.edu/about/donors_list.html.

secure an unassailable market position in the emerging interactive broadband TV environment.

We shouldn't be blaming Prof. Owens, really, but rather his employers, who are not being straightforward with the Commission. The issue of retransmission consent is directly related to this proceeding because it's an example of how such rules will increase network market power. All your Media Bureau would have to do is examine the trade publications to see the relationship between the networks, retransmission consent, and market power. For example, Mel Kamazin told an analyst gathering that Viacom would use CBS retransmission consent to enlarge the carriage of MTV Network properties.¹⁷ Similarly, News Corp./Fox and Disney/ABC use their retrans power to expand cable holdings that include Fox Movie, National Geographic, and Disney Cable networks.¹⁸ There are many, many more citations that illustrate how the networks have misinformed the Commission.¹⁹

The failure of the Commission to create a public process designed to illuminate media marketplace realities is a tragic one for our democracy. There has been no debate, and little independent scholarship, public discussion, and deliberation. Under your leadership, it has been a process that may have suited royal oligarchs from the past, but is not one that truly reflects the aspirations of a democratic society.

Sincerely,

Jeffrey Chester
Executive Director
Center for Digital Democracy

¹⁷ "Karmazin to Play Retrans Chip for MTVN Nets," *Multichannel News*, 22 May 2000.

¹⁸ "Some Nets Seek Bucks for Retrans," *Multichannel News*, 16 Dec. 2002.

¹⁹ For example, see "Time Warner, News Corp. Set Retrans," *Multichannel News*, 3 Jan. 2000; "Fade to Black?" *Multichannel News*, 3 Jan 2000.